6-4-1976

Quality Paving Co., Inc. v. Thomas A. Musselman

Appellant's Brief 1976-SC-0448

APPELLANT'S BRIEF

5359 SCJ 2d 4/86

SUPREME COURT OF KENTUCKY

No. 76-448

QUALITY PAVING CO., INC. - - - Appellant

versus

THOMAS A. MUSSELMAN - - - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FIFTH DIVISION
JUDGE RAYMOND C. STEPHENSON

BRIEF FOR APPELLANT

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This is to certify that copies of the within brief have been served on Michael E. Conliffe, and the Hon. Raymond C. Stephenson, the trial judge, pursuant to RAP 1.250.

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by Cathy R. Robinson

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BRIEF FOR APPELLANT

May it please the Court:

STATEMENT OF THE CASE

A. Nature of Proceedings.

This action was brought by the Appellant, Quality Paving Co., Inc., hereinafter called "Quality" against Thomas A. Musselman, the Appellee, hereinafter called "Musselman", in respect to a contract between the parties, whereby Quality was to furnish labor, materials, and leased equipment to Musselman, in respect to paving a motel parking lot in Louisville, Kentucky. Musselman had paid $17,500.00 on the contract and the balance of $8,194.70 was the sum sued for by Quality

(T.R. p. 2). Musselman filed an Answer and Counterclaim, which admitted the contract and the payment of $17,500.00 and denied that any sum was owed to Quality by Musselman. Musselman's Counterclaim stated that Quality's work was defective and asked for $7,000.00 in damages on the Counterclaim (T.R. p. 57). Quality replied to the Counterclaim filed by Musselman and denied that numerous attempts were made by Musselman to have Quality cure the defective work (T.R. p. 16). Musselman then filed a Third Party Complaint against Western Pancake House of Kentucky Inc. No. 3, hereinafter called "Western", on a separate and distinct contract between them. Western filed its Answer to the Third Party Complaint of Musselman and admitted the agreement to construct a Pancake House, and denied the remaining allegations, and stated that no amount was due Musselman until construction was completed in a workman like manner (T.R. pp. 18-19). Western is not a party to this appeal.

The matter came on for trial before the Court, without a jury, on January 12, 1976, and testimony was heard by witnesses in person and also by deposition, and without a Court Reporter. Following the trial, Findings of Fact and Conclusions of Law were filed by Quality on January 26, 1976, and were rejected by the Court on January 28, 1976 (T.R. pp. 25-30).

On January 26, Western filed proposed Findings of Fact and Conclusions of Law which were adopted by the Court on January 28, 1976 (T.R. pp. 31-33). Proposed Findings of Fact and Conclusions of Law were submitted by Musselman on January 26, 1976, and no

action was taken by the Court in respect to them (T.R. pp. 34-40). On February 2, 1976, a judgment was entered, based on the Findings of Fact and Conclusions of Law tendered by Western, holding that Western was under no obligation to tender any balance due to Musselman until such time as the parking area was completed in a good and workmanlike manner, in accordance with the agreement of Musselman and Western, and taxed the costs against Musselman (T.R. pp. 41-42).

Judgment was tendered by Quality on the controversies between Quality and Musselman and was overruled (T.R. p. 43). Judgment was then tendered by Musselman in respect to such controversies and was entered by the Court, dismissing the claims of Quality and also the Counterclaim of Musselman (T.R. p. 44). This is the Judgment from which Quality appeals.

A motion for a new trial was made by Quality, pursuant to KRCP 59.01(5)(7) and (8), and, in the alternative, that, pursuant to KRCP 52.02 and 52.04, Findings of Fact and Conclusions of Law tendered by Quality be adopted (T.R. p. 46). This was overruled (T.R. p. 46). The Notice of Appeal was filed on March 29, 1976, and the Designation of Record on Appeal was also filed on that date (T.R. pp. 47-48).

B. The Facts.

Quality and Musselman entered into a written contract on April 10, 1974, whereby Quality agreed to pave certain parking areas of the Thrifty Dutchman Motel and Pancake House, on Fern Valley Road in Louisville, and further agreed to rent a grader to Musselman (T.R. p. 14). This contract was filed at the trial (T.R. p. 49). Phillip Cato, President of Quality, testified before the Court that the grader and an operator were rented for $25.00 per hour to Musselman and that the operator was to get his directions on the job from Musselman, or his agent. John Paul Jones was the grader operator and he was to grade the subgrade and remove rocks, and after he finished grading, the paving was to be done by Quality, and was done by it under the direction of Rusty Snider. Since the grader and operator were furnished, Quality didn't shoot grades to make sure the area was ready for paving, because the contract did not call for it. Cato was aware of soft areas where the paving was to be done and pointed these out to Musselman, who did nothing about the soft spots. A bill was rendered to Musselman for $25,694.70 and $17,500.00 was paid, leaving a balance of $8,194.70 (T.R. pp. 49-52). The deposition of John Paul Jones was entered into evidence. Jones testified that he had been with Quality Paving for 14 years and was moving to Mississippi, and would be there permanently (Jones' depo. Qs. 5-14). Jones worked on the Musselman job in June of 1974 (Jones' depo. Qs. 20-21). Jones cut the subgrade with a grader

belonging to Quality Paving and Musselman was there when he started work (Jones' depo. Qs. 23-29). After the grader was dropped off by Quality at the site, Musselman told him what to do and Jones considered that he was working for him (Jones' depo. Qs. 34-37). Musselman told Jones to cut the grade to the depth of the stone to be put in, and showed Jones exactly the way he wanted the water to go, and checked Jones with a transit and with a rod. Jones cut the grade exactly like he wanted it (Jones' depo. Qs. 39-43). Musselman would walk over the job, show Jones exactly where he wanted the water to go, and checked it with a transit, and also set grades with stakes (Jones depo. Qs. 50-63). After the subgrade was put in, then stone was placed on top of it and spread (Jones' depo. Qs. 63-66). After the stone was down, Jones would grade it and Musselman would check it with a transit (Jones' depo. Qs. 75-77). After the rock was down and graded, Jones was through with the job, but a steamroller was used to smooth it finally and the elevations were checked by Musselman and regarded if necessary (Jones' depo. Qs. 89-103). Mr. Snider, who was a general superintendent of Quality, testified that he had the grader delivered on a lowboy to the site, and that Jones was to operate the grader under the directions of Musselman. He stated that the grader was there a week or so and that Snider went back to the site, from time to time, and Musselman was there at all such times. He stated that Musselman set the grades and that he saw him doing it, that there was a man with Musselman helping him hold the rods. He stated that Musselman did all the en-

gineering. He stated that he asked Musselman about the grading and Musselman said it was o.k. and drained all right (T.R. pp. 52-53).

Musselman stated that he rented the grader and operator for the purpose of having the operator on the site so that Musselman could tell him what to do, where he wanted him to operate, and what grade he wanted him to set, and that, after that was done, then Quality's job was to come in and put the asphalt down on top of the grades (Musselman depo. Qs. 142-145). Musselman testified that he paid $17,500.00 but withheld the balance because of the problems and that Cato met later and offered to reduce his claim $3,000.00 to settle the matter. Musselman was on the job frequently, knew how to use the transit and shoot grade, and he and the rod man shot some grades and that Jones graded where he told him to grade. He stated that basic engineering was done by Engineering Services (T.R. pp. 56-57). Musselman stated that Jones didn't set any grade (Musselman depo. Q. 149).

ARGUMENT

A. The Court Erred in Failing to Enter Any Findings of Fact and Conclusions of Law in Respect to the Controversies Between Quality and Musselman.

This action was tried before the Court, without a jury, and Kentucky Rules of Civil Procedure 52.01 provides that the Court "shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate Judgment". Following the trial,

Quality tendered Findings of Fact and Conclusions of Law to the Court and these were *rejected. Musselman* also tendered Findings of Fact and Conclusions of Law to the Court, and *no action was taken* in respect to them. Western tendered Findings of Fact and Conclusions of Law to the Court, and its findings were entered. However, these Findings of Fact relate only to the controversy between Musselman and Western, and were not decisive of the issues between Quality and Musselman. While the findings referred to deficient construction, neither the Findings of Fact nor Conclusions of Law attempt to assess the blame for such deficiency. These Findings of Fact go no further than to settle a controversy between Musselman and the Third Party Defendant, Western.

The law is clear that the entry of Findings of Fact and Conclusions of Law are a mandatory duty of the Trial Court in Judge-tried actions. In *Fleming* v. *Rife,* 328 S. W. 2d 151, the Court said:

> "The lower court made no findings of fact, and we are not enlightened as to which of the present factions constitutes a majority of the congregation or as to which has departed from the fundamental doctrines of the church. As an appellant court we are under no duty and have no right to try cases de novo. It is the mandatory duty of the trial court in all actions tried upon the facts without jury to find the facts specifically and state separately its conclusions of law thereon. CR 52.01."

Also, in *Standard Farm Stores* v. *Dixon,* 339 S. W. 2d 440, the Court said:

> "We cannot decide this question for the simple reason that there is not a single finding of fact or conclusion of law in this entire record upon which the judgment could be based (There is one finding of fact in the Master Commissioner's Report but the judgment did not follow the Commissioner's legal conclusion based on this finding.)
>
> CR 52.01 is most explicit in requiring the court, when trying a case without a jury or with an advisory jury, to 'find the facts specifically and state separately its conclusions of law thereon.' This requirement has a most salutary purpose. See Clay, C.R. 52.01, Comment 2 (Page 463).
>
> Compliance with the Rule has been held mandatory for plainly stated reasons in Fleming v. Rife, Ky., 328 S. W. 2d 151. This is th eview of the federal courts. Smith v. Dental Products Co., 7 Cir. 168 Fed. 2d 516, and Maher v. Henderickson, 7 Cir. 188 Fed. 2d 700."

There is a limited exception to this rule which provides that, where the record is so clear that the Court does not need the aid of the findings to reach a conclusion, such omission may be overlooked, but, clearly, this case is one in which the record is not that clear, in view of the absence of a transcribed record of testimony and evidence.

The Findings of Fact and Conclusions of Law entered at the instance of Western, do not touch such matters as assessing the fault for defects in the paving, and do not refer in any respect to the controversies between Quality and Musselman. This is borne out by the Judgment entered on February 2, 1976 (T.R. p. 41), which does not, in any way, do anything to except re-

solve the controversies between Musselman and Western. The Judgment, which affects Quality and Musselman, was entered on March 1 (T.R. p. 44) and, in effect, dismissed the claim of Quality on its Complaint and Musselman on his Counterclaim. This is the Judgment appealed from and there simply are no Findings of Fact and Conclusions of Law entered in respect to it.

Quality realized that no such findings had been made and, as an alternative to the granting of a new trial, and pursuant to CR 52.04, again requested that Findings of Fact and Conclusions of Law tendered by it be adopted by the Court. This was overruled by the Court (T.R. p. 46). In spite of this, no Findings of Fact and Conclusions of Law were tendered by Musselman and none were ever entered by the Court.

Quite clearly, this is a case in which Findings of Fact and Conclusions of Law are particularly important. In another case, where there is extensive testimony and exhibit evidence for the Court to review, the findings might not be so important, but, in this case, they are all important and the failure of the Court to enter any findings not only makes it impossible for Quality to understand the basis of the Judgment entered against it, but also makes it impossible for this Court to make a realistic determination of the controversy between Quality and Musselman. This is a serious defect in the procedures of the Court and should be corrected by the granting of a new trial, on all issues between Quality and Musselman.

B. The Court Erred in Receiving Testimony About an Offer of Compromise of the Controversy Between Quality and Musselman.

During the course of the trial, Musselman testified that he and Cato, President of Quality, had met and that Cato had offered to reduce his claim by $3,000.00 and to accept approximately $5,000.00 in settlement of his claim (T.R. p. 57). This testimony was objected to by the Attorney for Quality, although no written notation of the objection was made by the Trial Court, and was presumably considered by the Court. Offers of compromise clearly are not admissible as evidence at trial. *Elam* v. *Woolery,* 258 S. W. 2d 452; *Commonwealth of Kentucky* v. *Smith,* 358 S. W. 2d 487, and *Wolf Creek Collieries Company* v. *Davis,* 441 S. W. 2d 401. As pointed out in these cases, an offer of compromise is not admissible for the reason that the law favors settlement of controversies out of court and will not permit an offer of compromise to be used as a weapon against the party making the offer.

While the Trial Court undoubtedly understood the significance of offers of compromise far better than any jury would, nevertheless it cannot help but influence its thinking in respect to the matter. The Court had no knowledge of the basis of the offer, its term, or the reasons for it. Such factors as cash shortage in a business, desire to avoid litigation and its costs, and desire to avoid publicity regarding false claims, are valid reasons for compromise and the reason for such offer was not known or considered by the Court. It is clear

that the evidence accepted by the Trial Judge was inadmissible and is grounds for reversal on this point alone.

C. The Judgment Entered Against Quality is Not Supported by Substantial Evidence.

In cases tried by a Judge, rather than a jury, the Judge's decision must be given the weight accorded the verdict of a properly instructed jury, but where there is no substantial evidence to justify findings as entered by the Court it must be set aside. *Dudley, et al.* v. *Lovins, et al.,* 220 S. W. 2d 978; also *Lindon* v. *Potter,* 208 S. W. 2d 515.

The Judgment was not based on Findings of Fact and Conclusions of Law, as previously discussed. There simply was no Findings of Fact and Conclusions of Law entered in respect to the Judgment, between Quality and Musselman. That Judgment (T.R. p. 44) finds that Quality shall recover nothing of Musselman and that Musselman shall recover nothing from Quality on its Counterclaim for defective work. The Judgment completely overlooks the exhibits and testimony entered in this action. The contract, on which this litigation is based, has no provision in respect to grading and, in fact, clearly sets out that there is "grader rental". Jones, in his deposition, testifies that he graded the subgrade, at the direction of Musselman, Musselman showed Jones exactly the way he wanted the water to go, checked him with a transit and with a sighting rod, and that Jones cut the grade exactly like Mussel-

man wanted it (Jones depo, Qs. 23, 43, 63-73). Jones further testified that Musselman hardly ever left the job while Jones was on it and was there at all times when Jones was putting the tract on grade (Jones depo. Q. 86). Following the final grading, the tract was rolled by a laborer and Musselman was there while the rolling was being done and the area was regarded in three or four spots in the back, after it was rolled, at Musselman's instructions based on transit measurements of Musselman (Jones depo. Qs. 100-103). Jones considered himself to be under the supervision of Musselman and working for him on this particular job (Jones depo. Qs. 34-37). Jones, following the final grading, advised Musselman that it was his opinion that the water would not be carried off in front of the building and Musselman told him he believed it would go (Jones depo. Qs. 104-114).

Musselman rented a grader with an operator so that he could have the operator on the site for the purpose of telling what to do, where Musselman wanted him to operate, and what grade Musselman wanted him to set, and, after the grading was done, Quality's job was to come in and, for the prices on the proposal, put the asphalt down on the top of the grade (Musselman depo. 142-145). Jones did not set any grade and graded where he was told to grade by Musselman (Musselman depo. p. 149 and Musselman T.R. p. 57).

The facts of this case are analogous to the situation that arises most frequently in respect to the determination of liability where an employee of one company is loaned to another company, and the basic test of

whether a borrowed servant, doing special service for another, becomes the servant of the other, depends on who controls the servant while he performs the special service. *Turner Construction Company* v. *Garrett,* 310 S. W. 2d 786.

If the servant borrowed for a particular course of employment is under the control of the borower, he is responsible for the borrowed servant's actions and the fact that the servant is selected, paid, or may be discharged, by the original employer is not material. *Tindall* v. *Perry,* 283 S. W. 2d 700. It is clear that John Paul Jones was the borrowed servant in this situation and, as such, he was under the control of Musselman and, if he was under his control, Musselman, and not Quality, was responsible for his work.

Musselman and Jones both indicate that every grade Jones set on the job was at the direction of Musselman and that Jones was under the entire control of Musselman while he was on the job. This is further borne out by the contract providing for "grader rental" which Quality and Musselman agreed provided that both the grader and the man would be supplied by Quality.

Thus, we have the situation where Musselman says that the site does not drain well and he wants to blame this on Quality. Yet, the evidence, which is undisputed, shows that the grading was done under the specific direction of Musselman, from beginning to end, and that Quality had no hand in directing the efforts of Jones in setting grades, at any time. This was recognized by the Court in the March 1, 1976, Judgment, when it dismissed the claims of Musselman on his Counterclaim.

Thus, the Court, was left with the proposition that the defective construction, namely, erroneous grade, was solely caused by the actions of Musselman. At no place in the testimony was there any complaint by Musselman, or his witnesses, about the quality of the paving. His sole complaints were in respect to failure of the parking lot to drain properly, which he attributed to improper grading. Musselman attempted, through the testimony of witness Oligslager, who was the brother-in-law of the Attorney for Musselman, to establish the procedure stipulated under the contract. Oligslager, as a normal procedure, shot grade himself before laying asphalt. There was no testimony by Oligslager in respect to the way he would have handled the specific contract which was the basis of the litigation between Quality and Musselman.

So, in sum and substance, the Court had before it a contract providing for grader rental, borrowing of a servant by Musselman, and paving by Quality, on the grades, as determined by Musselman. This evidence is undisputed. The Judgment entered by the Court, based on no Findings of Fact or Conclusions of Law, simply disregarded this evidence, in respect to the claims of Quality. The Court entered Judgment dismissing the claims of Musselman against Quality, which was correct, but failed to then award Quality the balance due on its contract. The parties stipulated that the computation of $8,194.70, by Quality, as the amount due was correct, in respect to square footage paved and grader rental time actually used. The only quarrel was the determination of who caused the lot to drain im-

properly. Quality submits that fault should be hung on Musselman, who concedes that he controlled the grading completely (Musselman depo. Qs. 142-145).

CONCLUSION

The portion of the Judgment entered herein on March 1, 1976, which adjudged that Quality should recover nothing of Musselman should be reversed for three reasons:

1. No Findings of Fact and Conclusions of Law were entered by the Court and it is impossible for either of the parties before the Court, or this Court, to understand the basis on which the Judgment was entered from the record.

2. The Court clearly erred in permitting the introduction of testimony about the offer of compromise by Quality, which could not help but affect the attitude of the Court toward the controversy before it and was inadmissible.

3. The evidence clearly was disregarded in the dismissal of the claims of Quality when it clearly showed that the defective grades were the sole responsibility of Musselman and not Quality.

For these reasons the Appellant respectfully requests that the Judgment be reversed and returned to the Circuit Court for re-trial.

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